NOMINATION OF DENNIS MARTIN DEVANEY

HEARING

BEFORE THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

NOMINATION OF DENNIS MARTIN DEVANEY TO BE A MEMBER OF THE MERIT SYSTEMS PROTECTION BOARD

AUGUST 17, 1982

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NOMINATION OF DENNIS MARTIN DEVANEY

TUESDAY, AUGUST 17, 1982

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, D.C.

The committee met at 3:05 p.m., in room 3302, the Dirksen Senate Office Building, Hon. William V. Roth, Jr. (chairman of the committee), presiding.

Present: Senator Roth.

Chairman ROTH. The committee will be in order.

This afternoon, we are holding a hearing to consider the nomination of Dennis M. Devaney to serve as a member of the Merit Systems Protection Board.

First, I would like to welcome Senator Sarbanes, and I know that Senator Mathias was anxious to be here as well. Hopefully, he will be able to join us soon.

So, I call upon my good colleague and friend from Maryland. Paul, would you like to make the introduction?

TESTIMONY OF HON. PAUL S. SARBANES, U.S. SENATOR FROM THE STATE OF MARYLAND

Senator SARBANES. Mr. Chairman, I appreciate that very much. I am honored to present Dennis Devaney to the committee. He is a very distinguished resident of our State, a native of Maryland, a graduate of the University of Maryland at College Park where he obtained his B.A. degree, and subsequently did graduate work that led to his M.A. degree in government and politics. In 1975, he received a law degree from Georgetown University Law School.

Prior to that, he served 2 years in the U.S. Navy. Dennis has had extensive experience in Washington. He was assistant general counsel of the U.S. Brewers Association, and counsel for the Food Marketing Institute. He has been in the private sector of law since 1979 where he has had a very distinguished career.

He has worked closely with the Congress on a number of matters of concern, and also in Annapolis with the State legislature. He worked for NASA while he was going through law school as a law clerk.

I don't know of anyone who I think has greater sensitivity to the responsibilities involved with membership on the Merit Systems Protection Board than Dennis Devaney. Many of the functions of that Board are quasi-judicial in nature, as you are very much aware, Mr. Chairman, and I think Mr. Devaney brings the very qualities that we would expect from someone holding a quasi-judicial position.

His fairness, his intellectual integrity, his commitment to the standards and values embraced within the merit system, which are, I think, extremely important to the effective functioning of our Government, have been demonstrated in the past, and I think are without question.

Throughout his career, he has reflected the highest professional and personal standards. I am pleased to present him to the committee and to urge the committee's recommendation to the Senate that he be confirmed for this position on the Merit Systems Protection Board.

Chairman ROTH. Thank you, Senator Sarbanes.

We are pleased to have our other Senator from Maryland, a member of this committee, who I understand has tough questions to ask you, Mr. Devaney. [Laughter.]

TESTIMONY OF HON. CHARLES McC. MATHIAS, JR., U.S. SENATOR FROM THE STATE OF MARYLAND

Senator MATHIAS. Thank you, Mr. Chairman.

Senator Sarbanes has supplied the record with a rather full biographical sketch of Mr. Devaney and I won't repeat what he has already said. But I might just comment a little bit on the position to which Mr. Devaney has been nominated. It is a position in which this committee is enormously interested. In fact, the Merit Systems Protection Board was created in this very room; created by this committee as a part of the Civil Service Reform Act of 1978. It was discussed over a period of many months in this room.

We, as members of the committee, know that the role of the Merit Systems Protection Board as an adjudicator of prohibited personnel action and as the protector of merit principles, requires that its members be particularly sensitive to the special employment relationship between the Federal Government and the members of the civil service that support and serve the Federal Government so well.

The fact that Mr. Devaney has been a lifelong resident of the Maryland metropolitan area of the National Capital—born in Cheverly, living now in Columbia—I think guarantees that he will bring to the Merit Systems Protection Board an understanding of the civil service from a grassroots vantage point.

As Senator Sarbanes and I can both testify, many of Mr. Devaney's neighbors are civil servants or Government employees. So, what he offers—what he brings—will be a sensitivity to the role of the civil servant, which is very necessary at this time in which the Government is constricting the civil service rolls. These are the times in which there is likely to be a certain amount of jostling and a certain amount of pushing for position—not only from management down, but laterally as well—civil servants who are putting pressure on their peers.

I am encouraged by his nomination and I think he will serve well. I would urge that the committee act very expeditiously on this important nomination.

The MSPB is a three-person board, as the chairman well knows. When one of the seats is vacant, it can hamper the smooth and efficient operation of the Board.

As the merit system meets its first hard tasks as Government-wide RIFs, guaranteed to strain the orderly system established by the Civil Service Reform Act, continue, a full complement on the Board is more important than ever.

So I urge that we get Mr. Devaney to work just as quickly as we can.

Chairman ROTH. Thank you, Senator Mathias.

I would like to introduce Mr. Devaney's family. I think this is an important day not only for you but for your loved ones. We are pleased to have your wife, Christine.

Would you rise, please?

And your two daughters, Jeanne Marie and Susan. [Applause.]

Thank you.

Senator SARBANES. Mr. Chairman, we also have his father, so I think we ought to recognize Mr. Devaney.

Chairman ROTH. It is a real pleasure to have all of you here. You have a handsome family, indeed.

Mr. DEVANEY. Thank you, Mr. Chairman.

OPENING STATEMENT OF SENATOR ROTH

Chairman ROTH. Mr. Devaney, I want to welcome you to the committee and thank you for your cooperation with both the members of the committee and the staff.

I was going to make some comments about the Merit Systems Protection Board, but I think Senator Mathias has conveyed my thoughts both as to the importance to Government employees and to Government as a whole, and we think it is critically important that the vacancy be filled very promptly.

Because of the importance that this committee has attached to this position, we have reviewed your credentials extensively. The committee has received information from the Office of Government Ethics and the FBI. The nominee has filed responses to a biographical and financial questionnaire, and he has answered a set of prehearing questions. This information will be inserted into the record following his oral testimony.

Mr. Devaney, under our committee rules, all witnesses at nomination hearings must testify under oath. So, please stand and raise your right hand.

Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Mr. DEVANEY. I do.

Chairman ROTH. Mr. Devaney, would you like to make an opening statement?

TESTIMONY OF DENNIS MARTIN DEVANEY, NOMINEE, TO BE A MEMBER OF THE MERIT SYSTEMS PROTECTION BOARD

Mr. DEVANEY. Mr. Chairman, I would like to say it is a pleasure to be here before the committee today. I obviously deeply appreciate the kind words of the elected officials, my elected representatives in Maryland. I would also like to acknowledge the presence of the Chairman of the Merit Systems Protection Board, Mr. Herbert Ellingwood, who was kind enough to accompany me to the hearing this afternoon.

I do not have a prepared statement other than the answers previously provided to the committee. But I would be happy to respond to any questions you may have, Mr. Chairman.

Chairman ROTH. As I have indicated, the committee has already asked some substantive prehearing questions and your responses have been placed in the record. So, I will not repeat those questions. But I do have a few additional questions.

Is there anything you are aware of in your background which may represent a conflict of interest with the duties of the office to which you have been nominated?

Mr. DEVANEY. No, Mr. Chairman.

Chairman ROTH. Is there any issue presently under consideration by the Merit Systems Protection Board or any which may come under consideration for which you will have to disqualify yourself? If so, please be specific.

Mr. DEVANEY. No, not that I am aware of, Mr. Chairman.

Chairman ROTH. Do you know of any reason, personal or otherwise, which will in any way prevent you from fully and honorably discharging the responsibilities of a member of the Merit Systems Protection Board?

Mr. DEVANEY. I do not.

Chairman ROTH. Do you agree without reservation to respond to any reasonable summons to appear and testify before any duly constituted committee of the Congress if you are confirmed?

Mr. DEVANEY. Yes, I do.

Chairman ROTH. I think that concludes the questions I have. So, I do want to express again my appreciation, Mr. Devaney, to you for appearing before this committee. We will act very promptly and wish you well in your future endeavors.

Mr. DEVANEY. Thank you for your courtesy, Mr. Chairman.

Chairman ROTH. Thank you.

[The biographical information and responses to prehearing questions follow:]

BIOGRAPHICAL AND FINANCIAL INFORMATION REQUESTED OF NOMINEES

A. BIOGRAPHICAL INFORMATION

Question 1. Name: (Include any former names used.)
Answer. Dennis Martin Devaney.
Question 2. Address: List current residence address and mailing address.
Answer. 6878 Happy Heart Lane, Columbia, Md. 21045.
Question 3. Date and place of birth.
Answer. February 25, 1946; Cheverly, Md.
Question 4. Marital Status: (Include maiden name of wife or husband's name.)
Answer. Christine Marie Gallant Devaney.
Question 5. Names and ages of children:
Answer. Jeanne Marie Devaney, age 11; Susan Theresa Devaney, age 7.
Question 6. Education: List institution(s), dates attended, degree received and date degree granted.
Answer. St. James School, 1952–60; DeMatha High School, 1960–64; University of Maryland, 1964–68—B.A. (major: history); University of Maryland Graduate School, 1968–70—M.A. (major: government and politics); Georgetown University Law Center, 1972–75—J.D.
Question 7. Employment record: List all jobs held since college, including the title or description of job, name of employer, location of work, and dates of inclusive employment.

Answer. Clerk/Intern, Office of Congressional Relations, Department of State, Washington, D.C., 1965–69 (part-time, summers).

Communications technician, U.S. Navy, Pensacola, Fla., Washington, D.C.; Bremerhaven, Germany, 1970–72.

Instructor, government and politics, University of Maryland, European Division, Bremerhaven, Germany, 1971–72 (part-time).

Presentations specialist and law clerk, NASA Goddard Space Flight Center, Greenbelt, Md., 1972–75 (part-time, summers).

Law clerk, Donelan, Cleary, Wood & Maser, Washington, D.C., 1973–74 (part-time).

Assistant general counsel, U.S. Brewers Association, Washington, D.C., 1975–77.

Counsel, Food Marketing Institute, Washington, D.C., 1977–79.

Legislative analyst, Philip Morris, Inc., Washington, D.C., 1979.

Private law practice, Randall, Bangert & Thelan, Washington, D.C., 1979–81.

Private law practice, Tighe, Curhan & Piliero, Washington, D.C., 1981–present.

Question 8. Government experience: List any experience in, or association with Federal, State or local governments, including any advisory, consultative, honorary or other part-time service or positions.

Answer. In addition to the Federal Government positions listed in answer No. 7, I served as legislative assistant to the Vice Chairman of the Senate Judiciary Committee of the Maryland General Assembly in 1973–74 as part of a legislative action seminar sponsored by Georgetown Law Center. I am currently a member of the Utility Consumer Advisory Panel of the Public Service Commission of the State of Maryland through appointment by the President of the Maryland Senate. I also serve as Panel Chairman in two cases pending before the Health Claims Arbitration Office which was created by the Maryland General Assembly to arbitrate medical malpractice cases.

Question 9. Business relationships: List all positions held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership or other business enterprise, educational, or other institution.

Answer. 1979–81—Junior partner in firm of Randall, Bangert & Thelan, 1625 K Street, N.W., Washington, D.C. 20006. 1979–present—outside General Counsel, Best-Met Publishing Co., Inc., Suite 243, Joseph Square Village Center, Columbia, Md.

Question 10. Memberships: List all memberships and offices held in professional, fraternal, scholarly, civic, charitable, and other organizations.

Answer. American Bar Association—Sections on Administrative, Antitrust (Legislative Committee), Labor, and Natural Resources Law; Maryland State Bar Association—Section on Administrative Law; District of Columbia Bar—Labor and Administrative Law Divisions; Florida Bar; Knights of Columbus; Florida State Society—Board of Directors; Delta Theta Phi—Dean, E. D. White Senate, 1974–75; and National Lawyers Club.

Question 11. Political affiliations and activities: List all offices with a political party or any public office for which you have been a candidate. List all memberships and offices held in or financial contributions and services rendered to all political parties or election committees during the last 10 years.

Registered Democrat. I served as primary campaign manager for the late State Senator Edward Conroy, the 1980 Democratic nominee for U.S. Senate from Maryland. I also act as General Counsel and Assistant Treasurer for the Conroy for U.S. Senate Committee (1980).

I am a member of the 1st, 2d, and 5th District Democratic Clubs, the Columbia Democratic Club, and the Southern Howard Democratic Club. All of these listed clubs are located in Howard County, Maryland. I am also a member of the National Democratic Club.

I am a candidate for the Howard County Democratic Central Committee, which will be elected on September 14, 1982.

Since graduating from law school, I have made political contributions to various candidates, partisan and nonpartisan, and to political organizations. For the Committee's information, I have attached a listing of political contributions made by myself and my wife in 1982.

Political Contributions

1982:	
Maryland Election '80 Committee	$100.00
Steve Sachs '82	50.00
Citizens for Riley	40.00
Nichols Committee	50.00
Hoyer for Congress	260.00
Byron for Congress	250.00
The Sensenbrenner Committee	150.00
Salute to Norman Stone	25.00
Hymes for State's Attorney	12.50
McGuirk for Governor	100.00
1981:	
Hoyer for Congress Committee	150.00
Howard County Democratic Central Committee	10.00
Young Democrats of Howard County	15.00
Dollars for Democrats	15.00
Friends of J. Hugh Nichols	50.00
Byron for Congress Committee	10.00
Bob Davis for Congress	200.00
1980:	
Crawford for U.S. Senate Committee	25.00
Howard County Democratic Central Committee	27.75
Barnes for Congress Committee	15.00
Friends of Charles H. Hickey	42.00
Andy Ireland Campaign Committee	250.00
Shelby for Congress Committee	200.00
Young Democrats of Maryland	20.00
1979: Andy Ireland Campaign Committee	100.00
1978:	
Liz Bobo for County Council	20.00
Flowers for U.S. Senate	200.00
Committee to Elect O'Connell	50.00
Barbara Russell for School Board	10.00
Windsor for House of Delegates	20.00
Bob Erwin for House of Delegates	25.00
Food Industry Good Government Committee (FMI/PAC)	100.00
Citizens for Hoyer	100.00
1977:	
John O'Connell Campaign Committee	25.00
Food Industry Good Government Committee (FMI/PAC)	50.00
1976: Democrats '76 (Prince Georges County)	100.00

Question 12. Honors and awards: List all scholarships, fellowships, honorary degrees, honorary society memberships, and any other special recognitions for outstanding service or achievements.

Answer. Honorary society memberships: Omicron Delta Kappa, Phi Alpha Theta, Pi Sigma Alpha, and John Marshall Society.

Special Recognition: National Moot Court Team, Georgetown University Law Center; Meritorious Unit Commendation; and Sailor of the Month—Naval Security Group Activity, Bremerhaven, Germany.

Question 13. Published writings: List titles, publishers and dates of books, articles, reports or other published materials you have written.

Answer. I have occasionally written a "Washington Wire" column for both Food World and Food Trade News, which are owned by Best-Met Publishing Co., Inc., for which I serve as outside general counsel. I am enclosing sample copies for the Committee's files.

Question 14. Speeches: Provide the Committee with two copies of any formal speeches you have delivered during the last five years which you have written copies of and which are on topics relevant to the position for which you have been nominated.

Answer. None.

Question 15. Selection: a. Do you know why you were chosen for this nomination by the President?

b. What do you believe in your background or employment experience affirmatively qualifies you for this particular appointment?

Answer. a. I assume the President has nominated me because he has confidence in my abilities, based upon my personal and professional record, creditable references, and my legal reputation.

b. I believe that my legal experience with its emphasis on administrative, regulatory, and legislative practice, coupled with my prior public service, including familiarity with government personnel law, provides a strong background for the position.

B. FINANCIAL DATA (RETAINED IN COMMITTEE FILES)

C. FUTURE EMPLOYMENT RELATIONSHIPS

Question 1. Will you sever all connections with your present employers, business firms, business associations or business organizations if you are confirmed by the Senate?

Answer. Yes.

Question 2. Do you have any plans, commitments or agreements to pursue outside employment, with or without compensation, during your service with the government? If so, explain.

Answer. No, except to complete responsibilities as panel chairman in two cases before the Health Claims Arbitration Office in Maryland. The Maryland State Bar Association has encouraged attorneys admitted in Maryland to serve as panel chairmen in the health claims arbitration process. I have been serving as chairman in two cases which are about to reach the hearing stage and plan to complete action in these cases if deemed appropriate by the General Council of the Merit Systems Protection Board.

Question 3. Do you have any plans, commitments or agreements after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization?

Answer. No.

Question 4. Has anybody made a commitment to employ your services in any capacity after you leave government service?

Answer. No.

Question 5. If confirmed, do you expect to serve out your full term or until the next Presidential election, whichever is applicable?

Answer. Yes.

D. POTENTIAL CONFLICTS OF INTEREST

Question 1. Describe all financial arrangements, deferred compensation agreements, and other continuing dealings with business associates, clients or customers.

Answer. None.

Question 2. Indicate any investments, obligations, liabilities, or other relationships which could involve potential conflicts of interest in the position to which you have been nominated.

Answer. None.

Question 3. Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.

Answer. None.

Question 4. Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation or affecting the administration and execution of law or public policy.

Answer. I do a substantial amount of legislative and administrative work in my law practice. During the last ten years, I have represented clients on numerous legislative and regulatory matters. Major clients and issues with which I was involved include:

U.S. Brewers Association: Container deposit legislation; other environment issues; legislative and regulatory issues in the labor area.

Food Marketing Institute: Food and labor law issues; antitrust, particularly legislation to overturn the Supreme Court's *Illinois Brick* decision.

Randall, Bangert & Thelen—Major clients: Grocery Manufacturers Association; American Meat Institute; Conroy for U.S. Senate Committee: Election law; regulatory reform, and issues related to trucking deregulation.

Tighe, Curhan, Piliero & Case—Major clients: General Mills, Inc. (Yoplait U.S.A., Inc.); American Motors Corp., American Warranty Corp., U.S. Cable Corp. Legislation to authorize sale of yogurt in Maryland in 18-ounce containers; Clean Air Act; tax legislation, particularly Safe Harbor Leasing; cable television legislation.

During this time frame, I provided formal testimony on behalf of clients before Committees of the Congress on two occasions. Enclosed are copies of my statements before subcommittees of the Senate Commerce Committee and the House Interstate and Foreign Commerce Committee. (Retained in committee files.)

Question 5. Explain how you will resolve any potential conflict of interest, including any that may be disclosed by your responses to the above items. (Please provide a copy of any trust or other agreements.)

Answer. I will withdraw from any conflict of interest.

Question 6. Do you agree to have written opinions provided to the Committee by the General Counsel of the agency to which you are nominated and by the Attorney General's office concerning potential conflicts of interest or any other legal barriers to your serving in this position?

Answer. Yes.

E. LEGAL MATTERS

Question 1. Have you ever been disciplined or cited for a breach of ethics for unprofessional conduct by, or been the subject of a complaint to any court, administrative agency, professional association, disciplinary committee, or other professional group? If so, provide details.

Answer. No.

Question 2. Have you ever been investigated, arrested, or charged or held by any federal, state or other law enforcement authority for violation of any federal, state, county or municipal law, regulation or ordinance, other than a minor traffic offense? If so, provide details.

Answer. No.

Question 3. Have you or any business of which you are or were an officer ever been involved as a party in interest in any administrative agency proceeding or civil litigation? If so, provide details.

Answer. I am currently one of several plaintiffs in an administrative protest of the current assessments of certain properties owned by Howard Research and Development Corporation in Howard County, Maryland. I also served as one of the legal advisors to the Citizens for Equal Representation for Howard County. This group through ten registered voters challenged the Governor's reapportionment plan in the Court of Appeals of Maryland, pursuant to provisions of the Maryland Constitution. Read McCaffrey, of Whiteford, Taylor, Preston, Trimble & Johnson, Baltimore, Maryland, was attorney of record in the petition process. I provided expert testimony by affidavit in the case.

Question 4. Have you ever been convicted (including pleas of guilty or *nolo contendere*) of any criminal violation other than a minor traffic offense?

Answer. No.

Question 5. Please advise the committee of any additional information, favorable or unfavorable, which you feel should be considered in connection with your nomination.

Answer. None.

AFFIDAVIT

I, Dennis Martin Devaney, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

August 4, 1982.

DIANE BEAGHAN,
Notary Public, District of Columbia.

(My Commission Expires March 31, 1983.)

RESPONSES TO PRE-HEARING QUESTIONS

I. NOMINATION PROCESS AND POTENTIAL CONFLICTS

Question 1. Is there any issue currently under consideration by the Merit Systems Protection Board from which you may have to disqualify yourself? If so, please explain.

Answer. No.

Question 2. How were you selected to be nominated to serve as a Member of the Merit Systems Protection Board? Were there any conditions, expressed or implied, attached to your nomination?

Answer. I assume the President has nominated me to be a Member of the Merit Systems Protection Board because he has confidence in my abilities, based upon my personal and professional record, credible references, and my legal reputation and experience. There are no conditions, expressed or implied, attached to my nomination.

Question 3. Have you made any specific commitments with respect to the basic policies and philosophy you will seek to implement as a Member of the Merit Systems Protection Board?

Answer. I have made no commitments to anyone with respect to the responsibilities of the Board other than to myself to strive to use all of my talents and abilities to apply to Congressionally established statutory standards in a fair and impartial manner and to decide the cases based on the record evidence. I intend to work with Chairman Ellingwood and Vice-Chair Poston to insure that the Board's adjudicatory and policy functions are carried out in an effective and efficient manner.

Question 4. Why did you take this appointment to be a Member of the Merit Systems Protection Board?

Answer. With the passage of the Civil Service Reform Act, Congress gave the Merit Systems Protection Board a crucial role in serving the people and providing fair treatment to public employees. The Board is assigned the task of preserving the integrity of the Federal merit system. The adjudicatory mission of the Board is to decide cases and to make decisions impacting on the employer-employee relationship in the Federal sector which are fair, impartial, and meet the statutory standards. I look forward to bringing my talents and skills to the task of deciding cases and of helping to shape Merit Systems Protection Board policy during my term of office.

Question 5. Why do you feel that you are particularly well qualified to serve in this position?

Answer. My legal experience, with its emphasis on administrative, regulatory, and legislative practice, provides a strong background for the position. Additionally, I have special personal insight into the Federal merit service, having worked for several government agencies while in college and law school. During my prior public service as a law clerk at NASA Goddard Space Flight Center, I became familiar with government personnel law as one of my principal areas of responsibility.

II. THE MERIT SYSTEMS PROTECTION BOARD

Question 1. What is the role of the Merit Systems Protection Board?

Answer. The statutory language and legislative history of the Civil Service Reform Act clearly indicate that Congress intended the Merit Systems Protection Board to be the linchpin in the revised civil service system. The Board's mission is to insure the effective operation of merit principles and to protect the merit system. In carrying out its statutory duties of overseeing the personnel practices of the Federal government, the Board conducts special studies of the merit system, hears and decides charges of wrongdoing in employee appeals of adverse agency actions, and orders corrective and disciplinary actions against executive agencies or employees, when appropriate.

Question 2. What are the MSPB's most important functions?

Answer. The Civil Service Reform Act assigns to the Board four major areas of responsibility. First, the Board is to act as a quasi-judicial body, operating in a judicially independent manner to hear and decide employee appeals from actions taken by Federal agencies. Second, the Board is to adjudicate actions brought before it by the Special Counsel. Third, the Board is directed to conduct studies of the merit system which will help to assess whether the career civil service is being adequately protected against prohibited personnel practices. Fourth, the Board is given authority to review Office of Personnel Management rules and regulations to determine whether these rules or regulations as written or as implemented constitute prohibited personnel practices or violate merit system principles. In sum, the Board has a critical role to play in protecting the due process rights of employees and insuring that agencies are able to effectively manage their personnel in accordance with merit service principles and protections.

Question 3. What do you feel are the most important functions of the position to which you have been nominated?

Answer. I believe that the critical functions of a Member of the Board are to carry out the statutory responsibilities of the Board itself. The Board is an independent, quasi-judicial agency, which was created and structured by the Congress as a collegial entity. I intend to work closely wth Chairman Ellingwood, who is responsible, pursuant to the statute, for the internal, executive, and administrative authority of the Board, and with Vice-Chair Poston in both the adjudicatory and policymaking arenas, to accomplish the Board's mission in conformance with the statutory requirements.

Question 4. How do you see the relationship between the MSPB and (a) the Office of Personnel Management, (b) the Federal Labor Relations Authority, and (c) the Office of Special Counsel of MSPB?

Answer. Congress took special care to provide that the functions of the Merit Systems Protection Board are carried out in a fair and independent manner. From the statute and legislative history, it is apparent that the Congress intended to separate the powers which had been jointly held by the Civil Service Commission of being both prosecutor and adjudicator in government personnel matters. I am in strong agreement with the philosophical premise underlying the creation of a separate, independent adjudicatory agency to hear and decide government merit system appeals. While the statutory autonomy of the MSPB is critical, it is also important for efficient policymaking that channels of communication and dialogue be kept open between the MSPB and other key decisionmaking bodies within the merit system, such as the Office of Personnel Management, the Federal Labor Relations Authority, and the Office of Special Counsel of the MSPB.

(a) *OPM.*—OPM is responsible for advising and assisting the President in the development of Federal personnel management policies and practices, and for providing personnel management guidance to Federal agencies. The Merit Systems Protection Board is an independent adjudicatory body which reviews employee appeals of agency personnel actions and has the authority to overturn OPM regulations, as well as to make studies of the merit system generally. It is important that the autonomy of each of the agencies be respected. Dialogue on matters of mutual concern is vital to effective management and policy-making.

(b) *FLRA.*—With respect to Federal Labor Relations Authority, there are areas in which there may be an overlap between the adjudicatory mission of the MSPB and the role of the Federal Labor Relations Authority. It is my understanding that informal efforts have already been undertaken by Chairman Ellingwood and his predecessors at the Board and at the FLRA to maintain a cooperative relationship so that in the areas where there are possible overlaps, such as when prohibited personnel practices heard by the Board also contain allegations of unfair labor practices which would be within the purview of the FLRA that cooperative efforts and communications are maintained to insure that the statutory requirements set out by the Congress for both agencies are fulfilled.

(c) *Special Counsel.*—With respect to the Special Counsel's relationship with the MSPB, I believe that characterization of this administrative structure as similar to that of a court to a prosecutor is a fair analogy. The statute and the legislative history of the Civil Service Reform Act emphasize Congress's intent that the Special Counsel perform the investigative and prosecutorial duties of the office in an independent fashion. It is my understanding that in areas such as administration and personnel management the problems which had beset earlier Board-Special Counsel relations have been alleviated. Mr. Kozinski has recently resigned to accept a position as a Court of Claims Commissioner. I assume efforts to maintain an effective liaison between the Board and the new Special Counsel will continue.

Question 5. How do you see the relationship and responsibilities of the MSPB to (a) the President, (b) the Congress, and (c) the Executive Agencies?

Answer. The independence of the Merit Systems Protection Board is provided through several statutory protections, including those which empower the Board to staff the agency on the basis of criteria established by the Board, budgeting provisions which authorize the Merit Systems Protection Board to submit its budget requests to the President and the Congress at the same time, and appointment criteria and tenure for Members of the Board which are designed to allow Board members to function in an impartial adjudicatory manner.

(a) *The President.*—It seems to me that the President and the Board have a mutual interest in insuring that the Federal service is governed by merit system principles, that cases decided by the Board are made in a fair and impartial fashion and that the Board efficiently carries out its functions. Under our sys-

tem of representative government, separation of powers is a critical component in the creative tension established by the framers of the Constitution among the executive, legislative, and judicial branches. The President is elected by all of the people and acts as chief executive officer of the Federal establishment. I believe that the goal of the MSPD should be to cooperate with the President, working to achieve a strong and effective Federal career service founded on merit principles, while at the same time always understanding the basic premise of the statute which created the Board as an independent adjudicatory body.

(b) *The Congress.*—With respect to the relationship of the Board to the Congress, as with independent agencies generally, the Board is essentially a creature of the Congress. Its statutory authority and mission is set out by the Congress in the Civil Service Reform Act. To guarantee that the Board would be an impartial adjudicator, the legislative structure provides important protections to Board deliberations. In light of Congress's oversight role and the legislative goals set for the agency by the Congress in the enabling statute, I believe that the Board and Congress must work together to implement the mandate of the Civil Service Reform Act, so that the Board is able to carry out its mission of protecting the merit system from political abuse, maintaining the integrity of and confidence in the civil service system, and overseeing the implementation of merit principles on a day-to-day basis in the Federal workplace.

(c) *The Executive Agencies.*—The Board's relationship with other agencies of the Federal government can perhaps best be compared to the relationship of a court to parties in interest who appear before it. The Board has a statutory obligation to decide cases promptly and fairly. By carrying out this mission, the Board insures that the rights of employees are protected pursuant to merit system principles and allows Federal managers to have a clear understanding of their duties and responsibilities within the Federal merit system. The other Federal executive agencies have an obligation to comply with the statutory standards applicable, and the Board rightfully expects that agencies will make good-faith efforts to meet the various procedural and substantive obligations which they as a party in interest may have. Congress has given the Board appropriate enforcement powers in those instances where dilatory tactics or other substantive issues require their use.

Question 6. It has been discussed that MSPB takes more time than necessary on many of its cases. Do you have any ideas on how the turnover time on cases could be improved?

Answer. As the Committee is aware, the Board's case load has increased dramatically within the last year and one-half. During this time period, the agency was faced with a budget crunch which necessitated a brief furlough of MSPB employees until the emergency supplemental appropriation was passed by the Congress and signed by the President. In addition, the Board for a substantial portion of its existence has been operating with only two members. With this as a background, it is my understanding that the Board's record in terms of case processing time is substantially better than that of the old Civil Service Commission. In testimony before the Senate and House Appropriations Committees, Chairman Ellingwood indicated that, although fiscal constraints had hampered the Board's ability to effectively process the influx of new cases, the Board through management initiatives had been able to adhere to the Board-imposed 120-day rule at the regional office level in the majority of cases. Additional resources provided in the emergency supplemental were a high priority for the Board and will enable the Board to return to a situation in which responsive and timely decisions are the rule and not the exception. The Board has also taken a number of steps to try to improve the efficiency of case handling within the agency. One of the priorities which I have set for myself, if confirmed by the Senate, is to work with Chairman Ellingwood and Vice-Chair Poston to implement management programs and case-control methods that will enable us to decide cases in a fair but expeditious manner.

III. THE CIVIL SERVICE REFORM ACT

Question 1. What are the most important principles of the Civil Service Reform Act?

Answer. It seems to me that the critical principles of the Civil Service Reform Act are summarized in the preamble to the statute.

The primary objective of the Act, first, is to provide the people of the United States with a "competent, honest and productive Federal work force reflective of the Nation's diversity, and to improve the quality of public service," and

second, that in order to achieve that objective, "Federal personnel management should be implemented consistent with merit system principles and free from prohibited personnel practices."

Question 2. Do you feel that the Civil Service Reform Act offers too much, too little, or the appropriate amount of protection for the Federal employee?

Answer. I believe that the Civil Service Reform Act represents an effort by Congress to strike the appropriate balance between the protection of the employee and the needs of management in the Federal service. I am aware of the debate in this area that took place during deliberations with respect to passage of the Act. I am also aware that there is ongoing criticism by many individuals of the balance struck since the statute became effective. I think that I would be a more creditable advisor in this area when I have reviewed the cases which are in the pipeline and can analyze the decisions of the Board as they are implemented on a day-to-day basis. At this point, I would like to reserve judgment on a final conclusion until I have an opportunity to see the system in operation.

Question 3. MSPB completed a study which showed that a high percentage of the Federal employees surveyed have seen cases of retaliation against whistleblowers. In light of this report, do you feel that the Civil Service Reform Act has effectively protected "whistleblowers" from retaliatory action?

Answer. The Civil Service Reform Act gives primary responsibility for the protection of "whistleblowers" to the Special Counsel, who can bring cases of retaliation against whistleblowers before the Board. The scope of authority and powers of the Special Counsel have been a controversial feature of the Act during the debates prior to its passage and in practice since the Act has been implemented. In my view, the statutory structure seems to provide appropriate authority to the Special Counsel to protect whistleblowers. Congresswoman Schroeder, Chair of the Subcommittee on Civil Service in the House of Representatives has suggested that the Special Counsel's office be abolished. I would like to have an opportunity to review this area on the basis of the actual record and cases before the Board. It is my understanding that a study done by the MSPB indicated that many government employees are not aware of the protections offered through the Special Counsel.

Question 4. There has recently been discussion of the politicization of the Senior Executive Service. Do you feel that the Civil Service Reform Act properly protects the SES?

Answer. I believe that the Act provides a legislative structure which can adequately insulate the career service from politicization. The question in this area is again one of implementation. On the record that has been developed to this point, the evidence suggests that there is not an unmanageable problem with respect to the SES. It is my understanding that only one case alleging politicization in the SES has been adjudicated by the Board. In that instance the Board concluded that there was insufficient evidence of political manipulation. Obviously, this is a most sensitive area, and Congress's mandate to insure that career service personnel decisions are made on merit principles is a stringent one.

Question 5. Do you feel that any changes in the Civil Service Reform Act are necessary to carry out the goals of the Act as completely as possible?

Answer. I believe that there is always room for improvement as experience is gained and the impact of legislative language is given practical application. The Board has now decided cases for several years under the revised statute. The Board is conducting a comprehensive analysis of the effectiveness of the Act. If confirmed, I am committed to playing a major role in this review. When the analysis is complete, the Board intends to work closely with this Committee and the Congress in making any adjustments which a legislative consensus indicates are necessary.

IV. RELATIONS WITH CONGRESS

Question 1. Do you agree without reservation to respond to any reasonable summons to appear and testify before any duly constituted Committee of the Congress if you are confirmed?

Answer. Yes.

Chairman ROTH. The committee is in recess.

[Whereupon, at 3:16 p.m., the committee recessed, to reconvene subject to the call of the Chair.]

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